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No. 79-1056

In the Supreme Court of the United States

OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC., PETITIONER

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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INDEX

Page

Questions presented 1

Statement 2

Discussion 4

Conclusion 12

CITATIONS

Cases:

Brooklyn Savings Bank v. *O'Neil*, 324 U.S. 697 10

Caserta v. *Home Lines Agency, Inc.*, 273 F. 2d 943 10

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 ..... 5, 6

Foremost Dairies, Inc. v. *Ivey*, 204 F. 2d 186 10

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 4

Heizer Corp. v. *Ross*, 601 F. 2d 330 5

Hodgson v. *Sagner, Inc.*, 326 F. Supp. 371 11

Laffey v. *Northwest Airlines, Inc.*, 366 F. Supp. 763, aff'd in part and vacated in part, 567 F. 2d 429, cert. denied, 434 U.S. 1086 ..... 2, 3

McClanahan v. *Mathews*, 440 F. 2d 320 10

Overnight Motor Transp. Co. v. *Missel*, 316 U.S. 572 10

Page

Cases—(Continued):

Professional Beauty Supply, Inc. v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 5

Stevenson v. *International Paper Co.*, 432 F. Supp. 390 5

Union Stock Yards Co. v. *Chicago B. & Q. R.R. Co.*, 196 U.S. 217 4

Wilson P. Abraham Construction Corp. v. *Texas Industries, Inc.*, 604 F. 2d 897, petitions for cert. pending *sub nom. Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, No. 79-1144 5

Statutes and rules:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e 1, 2, 3, 4, 5, 12

Equal Pay Act of 1963 (Fair Labor Standards Act of 1938), 29 U.S.C. 201 *et seq.* 1, 3, 4, 6, 7, 10, 11

29 U.S.C. 206(d) 1, 3, 4, 6, 7, 10

29 U.S.C. 206(d)(1) 2, 7

29 U.S.C. 206(d)(2) 6

29 U.S.C. 206(d)(3) 10

29 U.S.C. 216(b) 6, 10

29 U.S.C. 216(c) 6, 10

28 U.S.C. 1292(b) 4

Fed. R. Civ. P. 19(a) 2

Fed. R. Civ. P. 54(b) 4

Page

Miscellaneous:

108 Cong. Rec. 14752 (1962) 7

108 Cong. Rec. 14766-14767 ..... 8, 9

109 Cong. Rec. 9209 (1963) 9

Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978) 1

Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979) 1

H.R. 6060, 88 Cong., 1st Sess. (1963) 9

H.R. 11677, 87th Cong., 2d Sess. (1962) 7, 8, 9

Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 1, 6

Restatement (Second) Torts (1979) 5

W. Prosser, *Law of Torts* (4th ed. 1971) 5

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The United States submits this brief pursuant to the Court's order of February 25, 1980 inviting it to express its views.[1]

QUESTIONS PRESENTED

1. Whether a right to contribution may be asserted against a labor organization by an employer held liable under the Equal Pay Act of 1963.

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[1]The Equal Employment Opportunity Commission is the agency charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of

2. Whether a right to contribution may be asserted in a separate action by an employer held liable under Title VII of the Civil Rights Act of 1964 against a labor organization not named in a charge of discrimination filed with the Equal Employment Opportunity Commission.

STATEMENT

This suit had its genesis in *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), aff'd in part and vacated in part, 567 F. 2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), in which Northwest Airlines was found to have violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d), by compensating female cabin attendants less than male cabin attendants for substantially equal work. Northwest was ordered to disburse back pay to the plaintiff class under both statutes (Pet. App. 2b).

The discriminatory salary differentials found unlawful in *Laffey* were included in collective bargaining agreements between Northwest and the cabin attendants' successive unions, the Transport Workers Union (TWU) and the Air Line Pilots Association (ALPA) (Pet. App. 2b). However, only Northwest was named as a respondent in charges filed with the EEOC and as a defendant in the *Laffey* suit (*id.* at 9b). ALPA subsequently was included that action by plaintiffs as a non-aligned party under Fed. R. Civ. P. 19(a) without objection by Northwest, "solely for the limited purpose of assuring that the court [would] have before it all the parties necessary to effectuate relief * * *." 567 F. 2d at 477-478. ALPA did not, however, actively participate in the litigation (Pet. App. 4d).

1963, Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). This case presents questions concerning an employer's right to contribution from labor organizations for back pay liability arising under both statutes.

After trial and entry of judgment against Northwest, the airline for the first time attempted to assert claims against the unions for contribution or indemnity. It moved for leave to file a third-party complaint against TWU and to amend its answer to assert a cross-claim against ALPA (Pet. App. 2b). Both motions were denied. The court of appeals affirmed that ruling as within the district court's discretion, noting (567 F. 2d at 477) that "[t]o have reopened the litigation at the point [Northwest Airlines] sought it would not only have been judicially uneconomical but would also have inflicted a hardship on the parties." Northwest did not seek review of this holding in its petition for certiorari in *Laffey*.

Northwest subsequently filed this separate action seeking a declaratory judgment determining its right to obtain reimbursement from TWU and ALPA for a portion of the monetary liability assessed against it in *Laffey* (Pet. App. 4d). The complaint alleged that the unions shared liability with the employer under the Equal Pay Act and Title VII because they had negotiated, executed, and enforced collective bargaining contracts prescribing the unlawful salary differentials (*ibid.*).

Ruling on the unions' motions to dismiss, the district court held (Pet. App. B) that there is a federal common law right to contribution for liability under Title VII but not under the Equal Pay Act. Regarding the Equal Pay Act, the court concluded that neither employees nor employers have a right of action against labor organizations for violations of the Act and that to imply such a right as a predicate for contribution would conflict with the policies underlying the statute (*id.* at 3b-7b). As to Title VII, the district court held that although the filing of a charge with the EEOC is a prerequisite to bringing suit, the failure of the *Laffey* plaintiffs to name

the unions in a charge did not bar contribution because a cause of action for contribution arises under federal common law rather than under Title VII (*id.* at 8b-10b). The court further concluded that a right to contribution from labor organizations, which are jointly liable for back pay under Title VII, would further the policies of the statute by insuring that unions bear their fair share of that liability (*id.* at 15b-16b). The district court entered judgment under Fed. R. Civ. P. 54(b) as to the Equal Pay Act contribution claim and certified for interlocutory appeal under 28 U.S.C. 1292(b) its order regarding contribution for liability arising under Title VII.

The court of appeals affirmed the dismissal of the claim for contribution for Equal Pay Act liability but reversed and remanded for a determination of whether the Title VII contribution claim was barred by laches (Pet. App. D). The court held that a right to contribution from labor organizations would be inconsistent with the policies and scheme of the Equal Pay Act because Congress did not intend to render unions jointly liable to private plaintiffs for violations of the statute (*id.* at 10d-11d). The court of appeals declined to decide whether a right to contribution exists for liability incurred under Title VII. Instead, in view of questions raised on appeal as to whether the Title VII contribution claim was timely asserted the court remanded to allow the district court to resolve the issue in the first instance (*ibid.*).

DISCUSSION

1. The early federal rule, enunciated in *Union Stock Yards Co.* v. *Chicago B. & Q. R.R. Co.*, 196 U.S. 217 (1905), was that there could be no contribution among joint tortfeasors. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); W. Prosser, *Law of Torts* §50 at 305-306 (4th ed. 1971);

Restatement (Second) Torts §886A, Comment *a* (1979). However, in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974), an admiralty case, this Court specifically repudiated "the occasional breadth of its [earlier] dictum" and fashioned a right to contribution in an area in which contribution had not traditionally been recognized. The Court reasoned (*ibid.*) (citation omitted) that "a 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame."

Since *Cooper*, lower courts have applied its rationale in a variety of contexts, concluding that a federal common law right to contribution may be available where liability arises out of a statute that itself is silent on the question, so long as contribution is consistent with the statute's purposes. See, *e.g.*, *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (5th Cir. 1979), petitions for cert. pending *sub. nom. Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, No. 79-1144 (contribution conflicts with the purposes of the antitrust laws); *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979) (contribution available to the extent it promotes fairness without undermining deterrent effect of antitrust laws); *Heizer Corp.* v. *Ross*, 601 F. 2d 330, 332 (7th Cir. 1979) (contribution available for violations of Rule 10b-5 in part because it reinforces "policy underlying the securities laws"). See also *Stevenson* v. *International Paper Co.*, 432 F. Supp. 390, 408-409 (W.D. La. 1977) (contribution available where liability arises under Title VII of the Civil Rights Act of 1964).

Whether *Cooper* should be thus extended is, of course, open to debate. See Br. for the United States as Amicus Curiae in *Westvaco Corp.* v. *Adams Extract Company*, No. 79-972.[2] Many of the considerations which militate against a right to contribution in antitrust cases apply with equal force under the Equal Pay Act. The question of a right to contribution by employers against unions for Equal Pay Act violations, moreover, requires resolution of a difficult threshold problem on which the EEOC has not yet formulated a position, namely, whether an injured employee may sue the union directly. Every approach to the contribution issue begins with the assumption that the injured party could have sued and recovered against more than one defendant. If employee suits cannot be brought against unions under the Equal Pay Act, that threshold requirement will not have been met.

The Equal Pay Act does not, by its own terms, authorize anyone to sue anybody. It simply prohibits employers from engaging in specified conduct (29 U.S.C. 206(d)(1)) and prohibits labor organizations from "caus-[ing] or attempt[ing] to cause" employers to do so (29 U.S.C. 206(d)(2)). For enforcement purposes, Congress merged the Equal Pay Act into the Fair Labor Standards Act of 1938. That statute provides for private actions by employees against employers (29 U.S.C. 216(b)), and for actions by the Secretary of Labor[3] "to recover the amount of " any illegal wage differential claimed by an employee (29 U.S.C. 216(c)). It does not, however, expressly authorize suits by employees against unions. Therefore, a

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[2]We are furnishing a copy of that brief to counsel in the present case.

[3]This enforcement authority was transferred to the EEOC by Reorganization Plan No. 1 of 1978. See note 1, *supra*.

private right of action against a union, if it exists, must be implied from the structure, legislative history and purposes of the Equal Pay Act.[4]

There is much to suggest that Congress intended that unions would be covered by the Pay Act and held accountable under it in the same manner and to the same extent as employers. In 1962, an "equal pay" bill, H.R. 11677, passed both houses of Congress but was not enacted prior to the close of the session. An amendment bringing labor unions within the bill's sweep was debated extensively on the floor of the House and passed. That provision is substantially identical to the cognate provision in the Equal Pay Act of 1963.[5] Representative Griffin, a proponent of the amendment, described its purpose as follows (108 Cong. Rec. 14752) (1962) (emphasis added):

> [I]f we are to prohibit an employer * * * from discriminating in the payment of wages on the basis of sex, then surely it is only reasonable to make the prohibition applicable insofar as possible to labor

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[4]Clearly the FLSA, apart from the Equal Pay Act, does not provide a basis for implying a private right of action for employees against unions. Nowhere else in the FLSA is there a provision comparable to 29 U.S.C. 206(d) (prohibiting unions from causing employers to violate the statute). Nor does the legislative history of the FLSA, apart from the discrete history of the Pay Act, evidence an intent to reach union as well as employer conduct. Conversely, were this Court to conclude that a private right of action should be implied under the Pay Act, that determination should not be extended to the minimum wage, maximum hours and child labor provisions of the FLSA.

[5]The principal difference between the overall bill passed but not enacted in 1962 and the bill enacted in 1963 is that the latter adopted the enforcement scheme of the Fair Labor Standards Act.

> organizations, for they are often directly involved in creating the conditions or situations which are discriminatory.
>
> * * * * *
>
> The amendment to include labor unions * * * is a good amendment from another standpoint: *labor unions are made accountable and responsible for their part*, if any, in discriminating against women, this should help immeasureably in the administration of this act. Those who do not want hordes of bureaucrats roaming around to enforce this law can find here a way to make the bill self-policing, at least in establishments where there is union organization.

Representative Zelenko, who offered the amendment, added (108 Cong. Rec. 14766-14767 (1962)) (emphasis added):

> [T]here is included in the bill a prohibition against the labor unions or organizations that might attempt to coerce or influence or bargain an employer to violate the provisions of this [A]ct. Up to this point, it was the employer that was liable. But it is thought that, perhaps, in his bargaining activities between labor management and unions, there might come a point where because of the insistence of a labor union, he might be obliged to violate the law as it applies to discrimination regarding the sexes. * * * [O]rganized labor is in favor of this amendment. They are willing to be placed in this bill and *to be subject to its penalties*, if they are involved in any violation.[6]

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[6]The terms of the 1962 bill authorized the district court to order payment of back wages by the "respondent" which was defined as the "employer or labor organization." Amendment to H.R. 11677 §§6(a),

These themes were echoed in the debate on the bill, H.R. 6060, that became the Equal Pay Act of 1963. For example, Representative Goodell, the man primarily responsible for merging the Pay Act into the FLSA, described the provision relating to union liability (109 Cong. Rec. 9209 (1963)):

> * * * I would like to ask the gentleman from Michigan [Mr. O'Hara] * * * to respond to this.
>
> We have been concerned here in a situation where an employer is bound by an existing agreement as to a wage differential * * * that * * * violates this [A]ct[7]—it discriminates against women. * * * [T]his bill as now written obligates the union and gives the union the responsibility to negotiate * * * to eliminate the discrimination and gives the Secretary of Labor, if necessary, the power to enjoin not only the employer but the union, to sit down and negotiate and eliminate the discrimination in violation of this [A]ct.

In response, Representative O'Hara, a member of the subcommittee which drafted the final bill, stressed (*ibid.*) (emphasis added) "that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, *they would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act.*"

Based on this history, it can be argued that Congress intended that unions and employers would be treated equally, and that the failure of the FLSA by its terms to reflect that equality simply reflects the fact that the statute was not drafted with unions in mind. See note 4, *supra.*

(d), 108 Cong. Rec. 14766 (1962). The bill provided for suit by the Secretary of Labor, but did not expressly create a private right of action.

At the same time, however, a sound argument can be made that a private right of action against unions is contrary to the basic purpose and structure of the Equal Pay Act. In order to mesh the Pay Act with the Fair Labor Standards Act, Congress provided (29 U.S.C. 206(d)(3)) that salary and wage differentials made unlawful by the Pay Act "shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]." In essence, an employer who violates the equal pay provisions of the statute has, like the employer who fails to pay the statutory minimum wage, obtained services without paying full value for them.[7] The measure of damages under the FLSA is the difference between what the employer should have paid and what it in fact did pay.

It is difficult to see how unions fit into this scheme. Although a union certainly may "cause" an employer to adopt salary or wage differentials that violate the Equal Pay Act, it would not benefit financially thereby. Thus, while in such circumstances the union would itself have

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[7]This is true even though the statute provides for payment of liquidated (double) damages. 29 U.S.C. 216(b) and (c). The central purpose of such an award is to compensate employees for the delay in receipt of back wages owing under the Act. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-708 (1945); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-584 (1942). As this Court observed in the latter case, "retention of a work[er's] pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." See also *McClanahan* v. *Mathews*, 440 F. 2d 320, 322-323 (6th Cir. 1971); *Caserta* v. *Home Lines Agency, Inc.*, 273 F. 2d 943, 947 (2d Cir. 1959); *Foremost Dairies, Inc.* v. *Ivey*, 204 F. 2d 186, 190 (5th Cir. 1953).

violated the Pay Act, monetary recovery against it ordinarily would be inconsistent with the rationale of the statute.[8]

In sum, the question whether a private right of action against unions should be implied under the Equal Pay Act is a difficult one. This Court might well benefit from further development of the issue in the lower courts. Moreover, it may be appropriate for the question to be resolved, in the first instance, in the context of an attempted employee suit against a union rather than in a contribution action brought by an employer held to have violated the Pay Act.

The considerations that militate against an implied private right of action may well be a reason to deny a right of contribution against unions under the Equal Pay Act even if there is an implied private right of action against them under that Act. The fact, previously noted (pages 10-11, *supra*), that the employer has benefited financially from the violation while the union has not is, if anything, even more pertinent to the equitable considerations bearing on a right to contribution than to the question of the implied private right of action.

We have suggested that the Court grant certiorari in *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972. Should the Court do so, it may wish to hold this petition pending a decision in that case, and then remand this case for reconsideration in light of whatever principles of

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[8]It may be, however, that recovery would be available under Title VII. Injunctive relief, and perhaps monetary relief in flagrant cases, may also be available under the Equal Pay Act in suits by the Commission against unions. See *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), aff'd per curiam on opinion below, 462 F. 2d 180 (4th Cir. 1972).

contribution are enunciated therein. Should certiorari be denied in *Westvaco*, we submit that it should be denied in this case as well.

2. We agree with respondents that the issues raised by the petition with respect to Northwest's contribution claim growing out of its Title VII violations are premature. The court of appeals did not reach these issues. Instead, it remanded the Title VII-based contribution claim to the district court for a determination of whether, in light of arguments made by the unions and the EEOC on appeal,[9] this separate action for contribution was untimely. Further review is therefore inappropriate at this time: the court of appeals has not decided the substantive question of whether a right to contribution for Title VII liability should be recognized and neither of the lower courts has decided the timeliness issue.

CONCLUSION

If certiorari is granted in *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972, this petition should be held and the case remanded in light of the Court's decision in that

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[9]In the court of appeals, the unions urged that the airline's claim was barred by laches, and the EEOC, while stating that a right to contribution exists in appropriate circumstances under Title VII, argued that Title VII's policy in favor of voluntary settlement should be given effect by requiring that a defendant assert a claim for contribution prior to judgment in the initial Title VII proceeding, after securing a stay and requesting conciliation by the EEOC (Pet. App. 12d). Although the EEOC urged the court of appeals to dismiss this separate action for contribution on the ground that it is untimely, the court remanded for a determination whether the action has been delayed unnecessarily under the circumstances of this case.

case or, in the alternative, this petition should be denied. If certiorari is denied in *Westvaco*, this petition for a writ of certiorari should be denied as well.

Respectfully submitted.

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